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23 AAOTTAE LOGGERVALE

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION

27 AASYLEI LOGGERVALE; AASYLEI
28 HARDGE-LOGGERVALE; and
AAOTTAE LOGGERVALE,

Plaintiffs,

v.

COUNTY OF ALAMEDA; STEVEN
HOLLAND; MONICA POPE; KEITH
LEEPER; ANTHONY DeSUSA;
and DOES 1 to 50, inclusive,

Defendants.

CASE NO. C20-4679-WHA

**PLAINTIFFS' RESPONSE TO COURT'S
REQUEST FOR FURTHER BRIEFING
(DKT. 276)**

Action Filed: July 14, 2020

Trial Date: February 13, 2023

1 Plaintiffs provide the following response to the Court's request for further briefing.

2 **1. Is any part of the trebling under the Bane Act punitive in nature?**

3 Plaintiffs have not found a published appellate decision directly on point. The closest
 4 appellate case is *Los Angeles County Metro. Transp. Auth. v. Superior Court*, 123 Cal. App. 4th
 5 261 (2004) ("*Los Angeles MTA*"). There, the issue was whether the \$25,000 statutory penalty
 6 under Civil Code Section 52 – the same statute that governs treble damages for Bane Act
 7 violations – was primarily punitive in nature. Government Code section 818 provides that a
 8 public entity is not liable for "damages imposed primarily for the sake of example and by way of
 9 punishing the defendant." The court in *Los Angeles MTA* noted that Section 52 allowed for "both
 10 an award of punitive damages *and* an award of a civil penalty. [Italics in orig.]" *Id.* at 267 ("By
 11 separately providing for exemplary damages *and* a civil penalty, the Legislature obviously
 12 intended for the two categories of relief to be distinct from one another. [Italics in orig.]").

13 The court of appeal went on to find that the statutory penalty could not have been
 14 "primarily for the sake of example and by way of punishing" as contemplated by Government
 15 Code section 818 because the statutory scheme allowed the civil rights plaintiff to recover *both*
 16 the statutory penalty *and* punitive damages. Allowing recovery of two separate remedies that
 17 have the same primary purpose would be an impermissible double recovery, which the
 18 legislature would not have intended.

19 But where the social objectives pursued by two categories of damages
 20 sought in one cause of action are the same, an award for both would create a
 21 double recovery. In *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175
 22 Cal.App.3d 218, 220 Cal.Rptr. 712, the court refused to allow punitive
 23 damages under section 3294 and a civil penalty for breach of warranty by a
 24 mobile home manufacturer provided for elsewhere in the Civil Code on the
 25 grounds that the two requested remedies each served to punish and make an
 example of the defendant. The court reasoned that if the Legislature had
 intended to allow awards for punitive damages and a civil penalty in the
 same cause of action, "it would in some appropriate manner have said so."
(Id. at p. 228, 220 Cal.Rptr. 712.) In this case, of course, by expressly
 providing for both exemplary damages and a civil penalty in section 52,
 subdivision (b), the Legislature has "said so."

26 *Los Angeles MTA*, at 268.

27 Similarly, here the Bane Act allows a plaintiff to recover all of the damages enumerated
 28 in Section 52, which include actual damages, treble damages, a \$25,000 penalty, and punitive

1 damages. Thus, the punitive damages are “primarily for the purpose” of punishment while the
 2 other remedies are decidedly not meant to serve that same primary purpose. Thus, Section 818
 3 does not preclude the County of Alameda from liability for treble damages.

4 Plaintiffs note that a recent appellate decision, which did *not* deal with Section 52 at all,
 5 distinguished *Los Angeles MTA* on the ground that it dealt with a civil penalty and not treble
 6 damages. *See K.M. v. Grossmont Union High School*, 84 Cal. App. 5th 717 (2022). Plaintiffs
 7 also note that there are unpublished district court cases that have found, contrary to *Los Angeles*
 8 *MTA*, that treble damages under the Bane Act are punitive in nature. *See, e.g., H.M. v. County of*
 9 *Kern*, C20-1339-JLT-BAK (BAM), 2022 WL 286614, *5 (E.D. Cal. Jan. 31, 2022); *Archibald v.*
 10 *County of San Bernardino*, C16-1128-AB (SPx), 2018 WL 8949779 (C.D. Cal. May 10, 2018);
 11 *Jefferson v. City of Fremont*, C12-926-EMC, 2012 WL 1534913 (N.D. Cal. Apr. 30, 2012). All
 12 of these cases rely on *dicta* from *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1172
 13 (1991), *overruled on other grounds by Munson v. Del Taco, Inc.* 46 Cal. 4th 661 (2009), where
 14 the California Supreme Court referred to the treble damages provision of Section 52 as
 15 “exemplary.” However, the court did not indicate that the “primary” purpose was exemplary and
 16 did not analyze Government Code section 818’s application to such damages.

17 Even if Section 818 may preclude imposition of treble damages under the Bane Act
 18 against a public entity, the County of Alameda is still precluded from making this argument for
 19 multiple reasons.

20 First, the County has not provided separate counsel for Defendant Holland. All
 21 Defendants are represented by Kevin Gilbert. Any argument that the County is not liable for
 22 treble damages will necessarily make Holland solely liable for those damages. Mr. Gilbert
 23 cannot make this argument as it is directly contrary to one of his client’s interests. *See Smiley v.*
 24 *Dir., Ofc. of Workers Comp. Programs*, 984 F.2d 278, 282-83 (9th Cir. 1993) (“It is well-settled
 25 that courts have the power to enforce the rule against representing adverse interests to assure
 26 fairness and the proper administration of justice. [Citations.]”). It seems more likely that Mr.
 27 Gilbert would have to be disqualified as counsel and new counsel retained to represent the
 28

1 County and the individual defendants before the County may assert that it is not liable for treble
 2 damages or any other portion of the judgment.

3 Second, Defendants waived any claim of error by failing to timely challenge the jury
 4 instructions or verdict form.

5 Third, and perhaps most importantly, the County of Alameda has confirmed in a sworn
 6 declaration from Peter Coletto, Deputy County Administrator, that “the County will indemnify
 7 both Defendants Holland and Pope for the portion of the Judgment against them pursuant to
 8 Government Code section 825, *et seq.*” See Dkt. 285-1, ¶ 5.

9 **2. What criteria for the exercise of discretion is required by the Bane Act itself
 10 or by any caselaw with respect to setting any multiplier under Section 52?**

11 The Bane Act itself does not appear to have any criteria for setting a multiplier. Civil
 12 Code section 52(a) simply provides for recovery of “any amount that may be determined by a
 13 jury, or a court sitting without a jury, up to a maximum of three times the amount of actual
 14 damages but in no case less than four thousand dollars (\$4,000).” Plaintiffs could locate no case
 15 that sets forth any criteria the judge or jury should apply in determining whether and how much
 16 to award in additional damages.

17 **3. What criteria for the exercise of discretion for the imposition of punitive
 18 damages is required by the federal due process clause?**

19 The Comment to the Ninth Circuit model jury instruction on punitive damages
 20 (Instruction 5.5) summarizes the law regarding the criteria for deciding whether to impose
 21 punitive damages in the first place:

22 As to § 1983 claims, “[i]t is well-established that a ‘jury may award
 23 punitive damages . . . either when a defendant’s conduct was driven by evil
 24 motive or intent, or when it involved a reckless or callous indifference to
 25 the constitutional rights of others.’” *Morgan v. Woessner*, 997 F.2d 1244,
 1255 (9th Cir. 1993). In *Dang v. Cross*, the Ninth Circuit held this
 26 “statement of the law of punitive damages is incomplete, however. The
 27 standard for punitive damages under § 1983 mirrors the standard for
 28 punitive damages under common law tort cases. . . . [M]alicious, wanton,
 or oppressive acts or omissions are within the boundaries of traditional tort
 standards for assessing punitive damages and foster ‘deterrence and
 punishment over and above that provided by compensatory awards.’ . . .
 Such acts are therefore all proper predicates for punitive damages under §
 1983.” 422 F.3d 800, 807 (9th Cir. 2005) (citing *Smith v. Wade*, 416 U.S.

1 30, 49 (1983)). The *Dang* court held it was reversible error to decline to
 2 instruct that “oppressive acts” were an alternative basis for punitive
 damages in a § 1983 case.

3 As to the amount of punitive damages, the relevant factors include (1) the reprehensibility
 4 of the defendant’s conduct; (2) the disparity between the harm or potential harm suffered by the
 5 claimant and his punitive damages; and (3) the difference between the punitive damages and any
 6 civil penalties authorized or imposed in comparable cases. *BMW of North America, Inc. v. Gore*,
 7 517 U.S. 559, 575 (1996). The Ninth Circuit has limited punitive damages to a 4 to 1 ratio
 8 “where there are significant economic damages . . . but behavior is not particularly egregious.”
 9 *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949,
 10 962 (9th Cir. 2005). However, the Ninth Circuit permits a single digit multiplier above 4 to 1
 11 where the compensatory damages are higher and there is “more egregious behavior.” *Id.* The
 12 Ninth Circuit has upheld punitive damages ranging from six to nine times compensatory
 13 damages in such cases. *Id.* at 962 (holding a 9 to 1 ratio was constitutional); *Bains LLC v. Arco*
 14 *Products Co.*, 405 F.3d 764, 776–77 (9th Cir. 2005) (indicating that ratio between 6 to 1 and 9 to
 15 1 would be constitutional); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir.
 16 2003) (upholding a roughly 7 to 1 ratio).

17 **4. Is the grand total award under the Bane Act limited to three or four times
 18 the compensatory damages?**

19 The grand total under the Bane Act is four times the compensatory damages. Civil Code
 20 section 52(a) provides for “actual damages, and any amount . . . up to a maximum of three times
 21 the actual damage . . .” The conjunctive “and” means that the treble damages are in addition to
 22 the actual damages, which may result in a total of four times the compensatory damages. This
 23 was also accurately captured by the Final Charge to the jury: “If you find a violation of the Bane
 24 Act, you may award damages resulting from the Bane Act violation of (1) actual damages and
 25 (2) any amount up to a maximum of three times the amount of actual damage, but not less than
 26 four thousand dollars (\$4,000).” *See* Dkt. 231, 17:11-14 (emphasis added); *see also Klein v. City*
 27 *of Laguna Beach*, 810 F.3d 693, 696 n.2 (9th Cir. 2016) (“The Bane Act allows recovery for
 28 ‘actual damages’ and treble damages, ‘but in no case less than four thousand dollars.’”).

1 **5. What criteria were included in our instructions to the jury for the exercise of
2 discretion in deciding whether and if so the extent to which Bane Act damages should be
3 enhanced beyond actual compensatory damages?**

4 None. The only instruction regarding the enhanced statutory penalty is Instruction No.
5 53, which contains no criteria for deciding whether and how much to award. *See Dkt. 231, p. 17.*

6 **6. The Court recalls no timely objection having been made to the Bane Act
7 instruction regarding trebling or the absence of criteria for the exercise of the jury's
8 discretion regarding trebling. Is this correct?**

9 The Court is correct. The Court's initial proposed verdict form did not permit the jury to
10 award an additional amount, up to three times actual damages, in the event the jury found for
11 Plaintiffs on the Bane Act claim. Dkt. 226-1. In response, Plaintiffs argued that the Bane Act
12 allows for an additional award of up to three times actual damages, and requested a line on the
13 verdict form for the jury to award such damages. Dkt. 228, 4:16-24. Defendants never objected
14 to this request. When the Court advised that it would include a jury instruction regarding treble
15 damages under the Bane Act, Defendants did not object. *See Trial Transcript, 1165:15-16.*

16 Plaintiffs cannot recall Defendants ever contending that the potential for an additional
17 award of up to treble damages are not available under the Bane Act or that any particular criteria
18 should be given to the jury to help determine such additional amount of damages to award. This
19 is likely because the law clearly permits treble damages and there does not appear to be any
20 particular criteria for the fact finder to employ in making its determination. On the contrary,
21 there is actually some authority that once the jury finds a Bane Act violation, the Court should
22 simply award treble damages on top of the compensatory damages. *See Directions for Use to*
23 CACI VF-3035 ("The court should compute the damages under section 52(a) by multiplying
24 actual damages by three, and awarding \$4,000 if the [resulting] amount is less.").

25 The only "objection" Defendants ever made was that after the jury began deliberating,
26 their attorney raised for the first time the argument that one or more of the penalties available
27 under the Bane Act are considered "punitive" such that the County of Alameda could not be
28 liable for paying it, pursuant to Government Code section 818. *See Trial Transcript, 1320-1322.*

1 But, as noted above, defense counsel has an inherent and unavoidable conflict in attempting to
 2 argue that the County should not be liable for any portion of the award that is the result of
 3 trebling as it runs directly contrary to the individual defendants' interests. Further, and more
 4 importantly, the County has now confirmed that it will be indemnifying the deputies for any
 5 awards against them. Thus, any potential objection that treble damages are punitive in nature is
 6 mooted by this representation. *See, e.g.*, Cal. Gov. Code § 825(b) (allowing government entities
 7 to indemnify employees against punitive damage awards).

8 **7. The Bane Act is Section 52.1 of the California Civil Code. Section 52 calls out
 9 for trebling only claims arising under Section 51, 51.5 or 51.6, but omits Section 52.1. What
 10 authority addresses this apparent discrepancy?**

11 Section 52.1(c) provides that a plaintiff may prosecute a civil action for damages
 12 "including, but not limited to, damages under Section 52 . . ." So the California Legislature
 13 intended that damages under Section 52 be recoverable in a Bane Act claim. The fact that the
 14 Bane Act is not specifically referenced in Section 52 itself is of no moment. The statute
 15 unambiguously permits recovery of damages "under Section 52" without limiting those damages
 16 to any particular subsection of Section 52. Further, the California Judicial Council recognized
 17 that a plaintiff who prevails on a Bane Act claim may recover damages listed under both
 18 subdivisions (a) and (b) of Section 52. *See CACI VF-3035, Directions for Use* ("Neither
 19 subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the
 20 Bane Act refers to section 52. (See Civ. Code, § 52.1(c).) This reference would seem to indicate
 21 that damages may be recovered under both subsections (a) and (b) of section 52.").

22 Numerous cases recognize the availability of treble damages under the Bane Act.
 23 *See Klein v. City of Laguna Beach*, 810 F.3d 693, 696 n.2 (9th Cir. 2016) ("The Bane Act allows
 24 recovery for 'actual damages' and treble damages, 'but in no case less than four thousand
 25 dollars.'"); *Grassilli v. Barr*, 142 Cal. App. 4th 1260, 1290 (2006) ("Under California law, a
 26 person who violates another person's constitutional rights may be liable for a maximum of three
 27 times the amount of the actual damage suffered"); *Gatto v. County of Sonoma*, 98 Cal. App. 4th
 28 744, 752-53 (2002) ("[S]ection 52—which applies to civil actions for denial of constitutional

1 rights under section 52.1 (§§ 52, subds. (a), (b))—created liability for up to a maximum of three
2 times the amount of actual damage suffered by any person denied specified rights.”). Plaintiff
3 has not found any case, state or federal, finding that the penalty of up to three times actual
4 damages is *not* available under the Bane Act.

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6 Dated: May 8, 2023

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/s/ Joseph S. May
By: JOSEPH S. MAY
Attorneys for Plaintiffs

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